UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte JUSTIN M. SMYERS and TRENTON M. OVERHOLT

Appeal No. 2005-1729
Application No. 09/921,762

ON BRIEF

Before FRANKFORT, McQUADE and NASE, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 15 and 25 through 47, all of the claims remaining in the application. Claims 16 through 24 have been canceled.

Appellants' invention relates to a stackable, open-top crate for holding and transporting objects, wherein the crate has improved stability and stacking fit while still providing an enlarged opening for ease of product loading and unloading. A further understanding of the invention can be derived from a reading of independent claims 1, 7, 32 and 35 on appeal, a copy of which claims appears in the "Claims Appendix" attached to appellants' brief.

The prior art references relied upon by the examiner in rejecting the appealed claims are:

Wise	4,848,580	Jul. 18, 1989
Apps et al. (Apps)	4,932,532	Jun. 12, 1990
Elvin-Jensen	5,439,113	Aug. 8, 1995

In addition, the examiner relies upon admitted Prior Art Figure 1 of the present application and sections of the specification (e.g., pages 1-2) which describe that prior art (hereinafter, the APA).

Claims 1 through 4, 32 through 38 and 40 through 43 stand rejected under 35 U.S.C. § 102(b) as being anticipated by the APA.

Claims 7, 9 through 11, 30, 44 and 47 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Apps.

Claims 1 through 4, 32 through 38 and 40 through 43 also stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the APA.

Claims 1 through 6, 25 through 29, 32 through 38 and 40 through 43 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the APA in view of Wise.

Claims 8 and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Apps in view of Elvin-Jensen.

Claims 9, 11 and 45 through 47 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Apps in view the APA.

Claims 12 through 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Apps in view of Wise.

Claims 34, 38 and 39 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the APA or the APA in view of Wise, taken further in view of Elvin-Jensen.

Rather than attempt to reiterate the examiner's commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by appellants and the examiner regarding those rejections, we make reference to the answer (mailed December 8, 2004) for the examiner's reasoning in support of the rejections, and to appellants' brief (filed April 5, 2004) and reply brief (filed February 8, 2005) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determination that none of the rejections before us on appeal will be sustained. Our reasons for that determination follow.

In considering the rejection of claims 1 through 4, 32 through 38 and 40 through 43 under 35 U.S.C. § 102(b) as being anticipated by the APA, we direct attention to pages 4-6 of the answer for a statement of the examiner's position. However, like appellants, and for the reasons set forth on pages 9-11 of the brief and pages 2-3 of the reply brief, we find that the examiner's position is unreasonable and attempts to totally read the "first distance" limitations out of the claims subject to this rejection. Moreover, there is no basis, other than speculation, for the examiner's conclusion that the APA somehow would provide "a tighter fit with a drag rail of the like crate stacked thereon," as required in independent claim 1, and by similar language in independent claims 32 and 35. Thus, we will not sustain the rejection of independent claims 1, 32 and 35 under 35 U.S.C. § 102(b) as being anticipated by the APA, or the rejection of claims 2 through 4, 31, 33, 34, 36 through 38 and 40 through 43 which depend therefrom.

As for the rejection of claims 7, 9 through 11, 30, 44 and 47 under 35 U.S.C. § 102(b) as being anticipated by Apps, while we agree with the examiner that Apps discloses a crate comprising a side wall (e.g., 26 or 28) formed with a bottom surface or floor structure (34) and that the crate therein includes a "drag rail"

formed by projecting portions of the perimeter structure (36) of the floor structure which each form a base wall of a respective redoubt member (66 or 68), we must agree with appellants that Apps fails to teach or suggest a crate wherein "an inner surface of the side wall is formed to position at least a portion of the side wall over the drag rail," as in independent claim 7 on appeal. The examiner's attempt to construe the spaced reinforcing posts (79) of Apps as being a part of the inner surface of the side wall structure (32) of the crate which thereby extends over the drag rail is unavailing. Apps, column 3, lines 54-59, makes clear that the spaced reinforcing posts (79) interconnect the floor structure (34) with the rectangular structure (32) of the crate "by engaging the tops of adjacent lateral or longitudinal struts 60, 62 and extending up and secured to the inside surface 38 of the rectangular structure 32." From this disclosure, it is clear that the reinforcing posts (79) extend up and are secured to the inner surface of the rectangular side wall structure (32) and thus do not define and are not part of the inner surface of the side wall structure. Because there is no portion of the inner surface of the side wall structure (32) of the crate in Apps which is positioned over the drag rail, it follows that claim 7 is not anticipated by Apps. In addition, it is clear that claims 9 through 11, 30, 44

and 47, which depend from claim 7 likewise are not anticipated by Apps. Therefore, the examiner's rejection of claims 7, 9 through 11, 30, 44 and 47 under 35 U.S.C. § 102(b) as being anticipated by Apps will not be sustained.

Regarding the rejection of claims 1 through 4, 32 through 38 and 40 through 43 under 35 U.S.C. § 103(a) as being unpatentable over the APA, the essence of the examiner's position is that the APA discloses the claimed invention "except for the stacking of two crates" (answer, page 7). The examiner then concludes that it would have been obvious to stack two crates in order to more efficiently use floor space by storing a plurality of crates in a space occupied by one crate. Be that as it may, for the reasons already explained above in our treatment of the examiner's anticipation rejection of these same claims, we conclude that the examiner has failed to set forth a *prime facie* case of obviousness. Accordingly, the rejection of claims 1 through 4, 32 through 38 and 40 through 43 under 35 U.S.C. § 103(a) as being unpatentable over the APA will not be sustained.

The next rejection for our consideration is that of claims 1 through 6, 25 through 29, 32 through 38 and 40 through 43 under 35 U.S.C. § 103(a) as being unpatentable over the APA in view of Wise. In this instance, the examiner asserts that "Re claim 1, 32 and 35, the admitted prior art [APA] discloses the entire invention, but a modification can be made in view of the teachings of Wise" (answer, page 7). In furtherance of the rejection, the examiner points to the gussets (77, 79, 81, 83, 85, 87, 89, 91, 84, 86, 88 and 90) of the bulk material container of Wise and urges that the tapered portions of the gussets "establish a first portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface so as to provide a tighter fit with a container stacked thereabove" (answer, page 7). The examiner then concludes, without further explanation, that it would have been obvious "to modify the admitted prior art crate to provide a tighter fit with the drag rail of a like crate stacked thereon."

Like appellants (brief, pages 14-16), we find no reasonable suggestion or motivation in the applied prior art for adding gussets like those seen in the bulk material container of Wise to the stackable tray for cans seen in Apps. From our perspective, the examiner has engaged in impermissible hindsight reconstruction by using appellants' claimed invention as a template to pick and choose among isolated disclosures and concepts in the applied prior art and then attempted to piece those disparate disclosures/concepts together in an effort to render appellants' claimed invention obvious. This approach is impermissible, and thus the examiner's rejection of claims 1 through 6, 25 through 29, 32 through 38 and 40 through 43 under 35 U.S.C. § 103(a) as being unpatentable over the APA in view of Wise will not be sustained.

Concerning the rejections under 35 U.S.C. § 103(a) of claims 8 and 31 based on Apps in view of Elvin-Jensen, claims 9, 11 and 45 through 47 as being unpatentable over Apps in view the APA, claims 12 through 15 based on Apps in view of Wise, and claims 34, 38 and 39 as being unpatentable over the APA or the APA in view of Wise, taken further in view of Elvin-Jensen, we have considered the prior art as applied to these dependent claims, but find nothing therein to make up for or otherwise overcome the fundamental flaws

in the APA and Apps pointed out above. In that regard, we refer to appellants' brief (pages 16-20) and reply brief for further reasoning as to why these claims would not have been obvious within the meaning of 35 U.S.C. § 103.

In light of the foregoing, the decision of the examiner rejecting claims 1 through 15 and 25 through 47 of the present application under 35 U.S.C. § 103(a) is reversed.

REVERSED

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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JOHN P. McQUADE) BOARD OF PATENT
Administrative Patent Judge) APPEALS
) AND
) INTERFERENCES
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JEFFREY V. NASE)
Administrative Patent Judge)

Konstantine J. Diamond
4010 E. 26th Street
Los Angeles, CA 90023

CEF/ki